United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6094

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Applicant-Appellee,

—against—

BIOPHYSICS SYSTEMS, INC.,

Respondent-Appellant.

and

BIOPHYSICS SYSTEMS, INC.,

Respondent-Appellant,

—against—

JOHN S. IRVING, General Counsel of the National Labor Relations Board, and SIDNEY DANIELSON, Regional Director of the National Labor Relations Board, Region 2,

Additional Defendants-Appellees on the Counterclaims.

BRIEF OF APPELLANT

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Respondent-Appellant
300 Park Avenue
New York, New York 10022
(212) 593-9000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

MISCELLANEOUS

76-6094

UNITED STATES COURT OF APPEALS

For the Second Circuit

NATIONAL LABOR RELATIONS BOARD,

Applicant-Appellee,

-against-

BIOPHYSICS SYSTEMS, INC.,

Respondent-Appellant.

and

BIOPHYSICS SYSTEMS, INC.,

Respondent-Appellant,

-against-

JOHN S. IRVING, General Counsel of the National Labor Relations Board, and SIDNEY DANIELSON, Regional Director of the National Labor Relations Board, Region 2,

Additional Defendants-Appellees on the Counterclaims.

BRIEF OF APPELLANT

STATEMENT OF ISSUES

1. Did the District Court err in its holding that this Circuit's ruling in Title Guarantee Co. v. National

Labor Relations Board, _____ F.2d _____, 78 LC ¶11,363 (2d Cir. 1976) foreclosed production of the material appellant sought from appellee National Labor Relations Board under the Freedom of Information Act, as amended, 5 U.S.C. §552?

2. Did the District Court err in its holding that material in possession of the National Labor Relations Board which tends to show that appellant did not commit the unfair labor practices with which it has been charged is exempt from production under the Freedom of Information Act, as amended, 5 U.S.C. §552?

3. Did the District Court err in its holding that authorization cards selecting a particular union to represent employees in collective bargaining with appellant that were signed by appellant's employees before the unfair labor practices in issue allegedly were committed are exempt from production under the Freedom of Information Act, as amended, 5 U.S.C. §552?

STATEMENT OF THE CASE

Charged with certain alleged unfair labor practices, appellant Biophysics Systems, Inc. ("Biophysics" or "the Company"), sought to obtain material from the National

Labor Relations Board ("the NLRB" or "the Board") pursuant to the Freedom of Information Act, as amended, 5 U.S.C. §552 ("FOIA") in order to defend against those charges. It initially sought the material by request letter dated June 16, 1975 (57a)* to the Regional Director of Region 2 of the NLRB. Both the Regional Director and, on appeal, the NLRB General Counsel's Office of Appeals, denied the request.

While Biophysics' appeal was pending before the General Counsel in Washington, Region 2 of the NLRB issued a subpoena duces tecum to the Company (43a). The subpoena required Biophysics to produce certain documents at the unfair labor practices proceeding. Biophysics declined to comply with the subpoena because it was inherently unfair for the NLRB to demand information from Biophysics at the same time that it was depriving the Company of access to information, and on certain, other, grounds that are not relevant to this appeal.

On January 7, 1976, the NLRB filed an application to enforce its subpoena in the United States District Court for the Southern District of New York (8a). Biophysics immediately answered and asserted counterclaims

* All references are to the appellant's appendix on appeal.

against the NLRB under the Freedom of Information Act (88a).

Next, the NLRB moved for an order pursuant to Rule 12(b)(6), Fed. R. Civ. P., dismissing the counterclaims for failure to state a claim upon which relief can be granted, or, in the alternative, for an order granting summary judgment pursuant to Rule 56(c), Fed. R. Civ. P.* On April 12, 1976, the District Court (per Robert A. Ward, D.J.) granted the NLRB's motion for summary judgment and dismissed the counterclaims (140a). Biophysics appeals from that decision of the lower court.

STATEMENT OF FACTS

The Parties

Biophysics, located in Mahopac, New York, manufactures thermometers and specialized medical devices. In business since 1968, it employs approximately 60 people.

On or about October 29, 1974, Biophysics received a letter from Local 1783, International Brotherhood of Electrical Workers ("Local 1783" or "the union") in which the union claimed to represent a majority of Biophysics' production, drafting, maintenance and shipping employees.

* Biophysics moved for an order enjoining the unfair labor practices proceeding until its FOIA claims could be resolved. At that time the hearing was scheduled for May 10, 1976; however, the NLRB agreed to adjourn the hearing until October 12, 1976 so the lower court did not have to pass on that issue.

The union demanded recognition as collective bargaining agent for the company's employees. However, not sure that the union in fact represented a majority of its employees, Biophysics declined to recognize Local 1783. It suggested, instead, that the union petition the NLRB to conduct an election among its employees, as provided for by the National Labor Relations Act. That petition was filed.

Subsequently, the Company and the union determined which employees fit within the parameters of the collective bargaining unit Local 1783 sought to represent and agreed on a date for the election. The election was held on December 12, 1974. The union received six votes; sixteen employees voted against representation by the union.

Faced with this loss, on December 17, 1974, the union filed objections to the election. On December 18, 1974, the union also filed unfair labor practice charges against the Company with the Board. Some three and one-half months later, in March, 1975, the Regional Director of the NLRB issued a complaint alleging that the Company had engaged in certain unfair labor practices. It also ordered that the election results be set aside.

In an effort to learn the nature of the charges being asserted against it and prepare its defense, on June 13, 1973, Biophysics served demands for a list of anticipated witnesses and for a bill of particulars on both the charging party, i.e., the union, and the General Counsel of the NLRB.

On July 2, 1975, the General Counsel filed a statement in opposition to Biophysics' demand for a list of anticipated witnesses. It also filed a response in part and opposition in part to Biophysics' demand for a bill of particulars. The "response" consisted of some relatively minor details relating to the NLRB complaint.

The Freedom of Information Act Request

On June 16, 1975, in a further attempt to prepare its defense, Biophysics filed a request for information with the Regional Director of Region 2 of the NLRB (57a). Pursuant to the FOIA, 29 U.S.C. §160(b), and Section 102.117 of the Board's Rules and Regulations, Biophysics requested:

-- affidavits and/or signed statements, obtained during the investigation of the unfair labor practice charge, of

individuals whom the General Counsel anticipated calling during the hearing on the unfair labor practice complaint.

-- in the alternative, such affidavits and/or statements with all personal identification removed.

-- copies of all authorization cards signed by Biophysics' employees selecting Local 1783 as their collective bargaining representative.

-- copies of all notes, memoranda, correspondence, notes of meetings, inter-office communications, etc. obtained during the investigation which were inconsistent with or in conflict with the charges alleged in the complaint or which showed or tended to show that Biophysics may not have committed the unfair labor practices alleged.

Just four days later, the Regional Director wrote a letter denying the request in its entirety. Following

receipt of the Regional Director's letter, on July 2, 1975, Biophysics timely appealed to the Board's General Counsel. The Director of the General Counsel's Office of Appeals also denied the appeal in its entirety.

As noted in the Statement of the Case, above, while Biophysics' FOIA appeal was pending, the NLRB issued a subpoena duces tecum requiring the Company to produce certain information at the NLRB hearing. Because Biophysics declined to comply with that subpoena until it secured the information it sought pursuant to the FOIA, the NLRB applied to the District Court for subpoena enforcement, thereby commencing the action now on appeal before this Court.

ARGUMENT

POINT I

THE LOWER COURT ERRED WHEN IT HELD THAT THE RECENT DECISION IN TITLE GUARANTEE FORECLOSED DISCOVERY OF ALL MATERIAL SOUGHT BY BIOPHYSICS

Despite the fact that this Circuit's opinion in Title Guarantee dealt with only one of the three categories of documents sought from the NLRB by Biophysics, the lower

court concluded that Title Guarantee was dispositive of the entire controversy (140a) and dismissed all of the Company's counterclaims. In doing so, the District Court violated express language in the Title Guarantee opinion and the teaching of the Supreme Court in Department of the Air Force v. Rose, 96 S. Ct. 1592 (1976).

In Title Guarantee a panel of this Court wrote:

> "We feel it unnecessary to make the broad determination that any investigative information obtained in connection with a pending enforcement proceeding is per se nondisclosable."
>
> 78 LC ¶11,363 at 20,688

Yet, the opinion before this Court for review holds that information automatically must be shrouded in secrecy if it is even remotely connected with an NLRB enforcement proceeding. Thus, the lower court succinctly wrote, "This Court reads the broad language of Title Guarantee to foreclose discovery of the material sought by Biophysics" (144a) and held that Biophysics was no more entitled to "Brady" material (after Brady v. Maryland, 373 U.S. 83

(1963), that is, information that showed it had not committed the unfair labor practices with which it had been charged) or authorization cards signed by its employees than it was to entitled to statements or affidavits signed by potential witnesses for the NLRB.

The lower court's ruling also ignores the Supreme Court's admonitions in Rose that the exemptions in 5 U.S.C. §552, permitting federal agencies to refuse to comply with FOIA requests in certain circumstances, be narrowly construed. In so holding, the Supreme Court gave further strength to this Court's own pronouncement of the proper judicial approach to the FOIA:

> "Courts have noted that the Act's remedial purpose was to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny. . . They have accordingly held that exemptions must be narrowly construed."

Rose v. Department of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974).

Both the Circuit Court and the Supreme Court's opinions in Rose gave substance to the goals Congress

sought to achieve when it amended the FOIA in late 1974. The purpose of those amendments was to accomplish more efficient, prompt and full disclosure of information under the Act, H. Rep. 93-876, U.S. Code Cong. & Adm. News, 93rd Congress, Second Session 1974, at p. 6267.

In pursuing its goal of achieving full disclosure, Congress rewrote Exemption 7 to the Act, §552(a)(7), on which the lower court's opinion turns. The revision was intended to correct agency abuse that had taken place under the old act. Senator Hart, sponsor of the amendments, described the Congressional intent as follows:

> "Recently, the courts have interpreted the 7th exemption to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes -- a stone wall at that point. The courts would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made. That, we suggest, is not consistent with the intent of Congress when it passed the basic act in 1966. . . ." (12) Cong. Rec. S9329, May 30, 1974)

The lower court rebuilt the stone wall Congress set out to destroy.

Section 552(b)(7) exempts from production:

> "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel".

Authorization Cards

The lower court ruled that authorization cards were exempt from production under subparagraph (C) above, as well as subparagraph (A), which is discussed below. Review of the Supreme Court's recent opinion in Rose is all that is necessary to demonstrate that the District Court's ruling on this exemption was clearly wrong and

must be reversed.

In Rose, student editors and former student editors of the N.Y.U. Law Review who were researching disciplinary systems and procedures at military academies sought to compel disclosure of case summaries of honor and ethics hearings with the personnel references or other identifying information deleted. The Air Force resisted disclosure, pointing, inter alia, to exemption 6 of the FOIA which relates to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy".

The Court refused to read the statutory language to foreclose production of all personnel and medical files without a showing that disclosure would entail a "clearly unwarranted" invasion of personal privacy, writing:

> ". . . Exemption 6 does not protect against disclosure every incidental invasion of privacy - only such

> disclosures as constitute 'clearly unwarranted' invasions of personal privacy"

and

"The legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." 96 S Ct. at 1608 and 1608, n. 19. The legislative history of exemption 7(c) is no different. See also, Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971).

The record below conclusively demonstrates that no unwarranted invasion of privacy would occur were the authorization cards at issue to be produced. A blank authorization card represented to be identical to those used by Local 1783 when it sought to organize Biophysics' employees has been made available to the Company by the NLRB. It does not request any highly personal information.

In addition, the very nature of the authorization card makes it impossible for the Board to argue that its contents must be kept confidential. As was pointed out to the court below, union representatives typically solicit such cards when they are seeking to organize at a new location. Moreover, the union organizers

frequently display those cards to employers in order to demonstrate that a majority of employees support unionization.

Finally it should be noted that exemption (C)-or any other subparagraph of Section 552(b)(7)-cannot come into play until and unless the information requested is part of an "investigatory record compiled for law enforcement purposes". Yet, the authorization records involved here are not such records. They were prepared and turned over to the NLRB before the alleged unfair labor practices with which Biophysics now is charged occurred. Those cards were not even in the NLRB's investigatory file on December 10, 1975 when the Board prepared an index of the documents in its file for submission to the District Court (150a and 166a).

The Board's own failure to treat the authorization cards requested as part of its investigatory file undercuts its argument that the cards now are precluded from disclosure under Exemption 7.* The lower court's ruling

* Significantly, the Eastern District of Pennsylvania ruled that authorization cards were not exempt from disclosure on somewhat similar grounds in The Committee on Masonic Homes of the R.W. Grand Lodge, F & A.M. v. N.L.R.B., Civil No. 76-851 (E.D. Pa., filed May 26, 1976). The court noted that the cards had not been compiled for law enforcement purposes. It held that the fact that the cards might later be used in an enforcement proceeding did not change their nature. The court also said that even if the cards had been compiled for law enforcement purposes, they would not be exempt under (7)(c).

on the cards clearly was wrong and must be reversed.

Exculpatory Material

The lower court brushed aside appellant's request for all documents "which are inconsistent with or conflict with the charges alleged in the complaint, or which show or may tend to show that [Biophysics] may not have committed the unfair labor practices alleged therein" saying only, "Biophysics' request for 'Brady material' surely falls within these strictures [the terms of the Title Guarantee opinion] and is consequently denied". (145a)

Concerned only with the Title Guarantee court's statement that Congress must not have intended to use the FOIA to amend NLRB rules relating to discovery, the lower court wholly disregarded Congress' express statement of one of the purposes of the FOIA. Congress said that the Act was to protect those engaged in litigation with the Government from losing their controversy because the Government had information which it kept secret. S.Rep. No. 813, 89th Cong., First Sess. (1966), at p. 7.

By requesting information that will demonstrate or tend to demonstrate that it did not commit the unfair labor practices alleged, Biophysics sought precisely that which Congress intended it to have when it enacted the FOIA. Yet, the lower court refused to enforce the Company's right to the material.

There is no support for the lower court's position in the Title Guarantee opinion. As the District Court observed, the panel in Title Guarantee was extremely sensitive to the "delicate relationship" which, it said, existed between employer and employee. The panel stated that it would not require disclosure if the result of its ruling would be to deter employees who wanted anonymity from giving information against their employers. The court below referred to this as the panel's concern not to "chill" employees in the exercise of their protected rights (145a).

However, no such concerns are relevant here. No employer is likely to harass or otherwise disturb an employee who gave information favorable to the employer.

In addition, all that Biophysics seeks is information demonstrating it did not commit the acts with which it has been charged. It will accept that information with the identity of any employee removed. The new amendments to the FOIA expressly provide for the deletion of exempt material from information that otherwise must be disclosed. Section 552(b) says:

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection".*

Thus, it is clear that the lower court should have ordered the NLRB immediately to produce all documents that demonstrated or tended to demonstrate that the Company had not committed the acts with which it had been charged. The District Court's ruling should be reversed and remanded so that it may determine whether any material must be deleted to protect employee identity before it is made available to Biophysics.

Finally, in this context, appellant notes that relying on Brady, supra, and elementary concepts of due

---

* In Rose, supra, the Supreme Court discussed this provision of the Act and placed heavy burdens on the agency and the District Court to properly delete, or redact, material so that the nonexempt portions could be produced.

process, a number of courts already have held that parties like Biophysics are entitled to access to all exculpatory material. See, e.g., Smith v. Schlesinger, 513 F.2d 462, 475 (D.C. Cir. 1975). See, also, Matter of Taibbi v. New York State Liquor Authority, 81 Misc. 2d 730 (Sup. Ct. Erie Co. 1975) and cases cited therein. Thus, in Equal Employment Opportunity Commission v. Los Alamos Constructors, Inc., 382 F.Supp. 1373, 1383 (D. New Mex. 1974), the court said:

> ". . . under an almost unbroken line of authority, I hold that plaintiff [the agency] here cannot play with defendant's hole card upturned and its hold card down under any claim of governmental or executive privilege, . . . Although Berger v. United States . . . was a criminal case, what was there said as to the responsibilities of government lawyers is fully applicable to government counsel in civil cases: 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done'."

POINT II

THE LOWER COURT ERRED WHEN IT HELD THAT THE NLRB HAD MET ITS STATUTORY BURDEN

Section 552(a)(3) of the FOIA provides that "each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed shall make the records promptly available to any person."

The draftsmen of the Act and its amendments sought further to insure against secret agency action by providing, in §552(a)(4)(B), that ". . . the burden is on the agency to sustain its action."

An agency cannot meet this burden by offering unsupported recitals of possible harm or making general predictions of the dire consequences that may flow from disclosure. In NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-164 (1975), the Supreme Court held that the statutory burden can be satisfied only by showing that a particular record is subject to a specific exemption.

There, Mr. Justice White said for the Court:

> "The legislative history clearly indicates that Congress disapproves of those cases, relied on by the General Counsel... which relieve the Government of the obligation to show that disclosure of a particular investigatory file would contravene the purposes of Exemption 7..." 421 U.S. at 164.

In the instant case, the NLRB failed to meet its statutory burden.

It merely asserted that documents fell within exemptions but failed to make a particularized showing as to any single document. Similarly, the lower court ruled on the documents sought by type but did not analyze, much less indicate that it had examined, a single one of the 182 items found in the NLRB's so-called investigatory file (150a-165a). The lower court thereby committed error and must be reversed, for, as the District Court stated in Rabbitt v. Department of the Air Force, 383 F.Supp. 1065, 1068 (S.D.N.Y. 1974):

> "...The Government's affidavits and memorandum of law cannot exclusively establish the extent of exempt material,

> for this determination is within the court's province alone....the statute does not authorize an agency, by a mere assertion, 'to throw a protective blanket over all information by casting it in the form of an internal memorandum'...."

See also, the Circuit Court opinion in Rose, supra.

Having determined that the panel's decision in Title Guarantee was dispositive of the case before it, the lower court totally ignored a significant difference between Title Guarantee and the pending case where the requested witness statements and affidavits are concerned. Biophysics expressly stated that it was prepared to accept statements with all personal identification removed, as is provided for by Section 552(b) of the amended Act. The lower court never even discussed Biophysics' offer to accept redacted statements. Yet, at least one court has suggested that this is the proper way to proceed if a court believes that an agency's concern to prevent any "chilling" effect is genuine. In Hardeman Garment Corp. v. NLRB, ____ F.Supp. ____, 91 LRRM 2055, 2057 (W. D. Tenn. 1975), the court wrote:

> "...the court might eliminate a name or address or identifiable reference to protect identify of a witness and, if necessary, or if he were entitled to an "informer status," this could still give defendants the benefit of the nature of evidence relied upon by [the agency] generally."

Finally, appellant respectfully suggests that the panel that decided Title Guarantee gave the NLRB's rules

governing discovery undue weight and that the decision therefore should not be followed here. Like the court in Cessna Aircraft Co. v. NLRB, 405 F.Supp. 1042, (D. Kan. 1975), this Court should summarily reject the NLRB's argument that virtually every document sought in the contest of an unfair labor practices proceeding is covered by Exemption 7(A). In Cessna, the court wrote:

> "This is not an action to review decisons of the Board regarding discovery matters which may or may not arise during the hearing in controversy now before that Board. This is a separate and distinct action to enforce provisions of the Freedom of Information Act, whose benefits are available 'to any person'. The Board cannot seriously contend that it is somehow exempt from provisions of the Act, or that its internal rules and regulations regarding discovery may apply to nullify provisions of that Act, or that plaintiff here, simply because it is engaged in litigation before the Board, is relegated to lesser status than general members of the public who may seek information pursuant to provisions of the Act."
>
> 405 F.Supp. at 1046

CONCLUSION

For the foregoing reasons, the lower court's opinion should be reversed in its entirety and appellant should be granted access to the material it seeks under

the Freedom of Information Act.

Respectfully submitted,

Proskauer Rose Goetz & Mendelsohn
Attorneys for Appellant
300 Park Avenue
New York, New York 10022

Dated: New York, New York
September 2, 1976

Of counsel:
Saul G. Kramer
Lois D. Thompson
Jonathan L. Sulds

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Ann H. Lister being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside at 27 Washington Square North, New York, N.Y. 10011

On September 2, 1976, I served the attached Brief of Appellant (2) and Appendix upon the following attorney(s) at the address designated by him (them) for that purpose:

Abigail Cooley
Assistant General Counsel For Special Litigation
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Edward H. Bennett, Regional Attorney
Region 2, NLRB, 36th Fl., Federal Building, 26 Federal Plaza
New York, N.Y. 10007

Said service was made by depositing a true copy of the attached Appendix and Brief of Appellant(2) enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Ann H. Lister

Ann H. Lister

Sworn to before me this
2nd
day of September, 1976.

Vitold J. de Stronie
Notary Public

VITOLD J. de STRONIE
Notary Public, State of New York
No. 41-4517529
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1978

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775